

TOXIC TORT & PRODUCT LIABILITY QUARTERLY



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I. CLIMATE CHANGE NUISANCE

Supreme Court Rules for Utilities in Climate-Nuisance Case

In a ruling that limits the ability of plaintiffs to hold greenhouse gas (“GHG”) emitters liable under nuisance law, the U.S. Supreme Court unanimously held that the Clean Air Act (the “Act”) and EPA rulemaking under the Act displace federal common law nuisance actions seeking to limit GHG emissions from electric power plants. *Am. Elec. Power Co. v. Connecticut*, No. 10-174, slip. op. at 1 (June 20, 2011), available at <http://www.bdlaw.com/assets/attachments/Connecticut.pdf>. The Supreme Court’s decision reversed a 2009 ruling by the Second Circuit, which had held that the plaintiffs — six states, New York City, and several land trusts — had standing to seek injunctive relief under federal “public nuisance” common law against private utilities operating fossil-fuel fired electric power plants that release GHGs into the atmosphere. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2009).

Citing its opinion in *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007), which held that GHGs qualify as air pollutants subject to regulation under the Act, the Court concluded that the Act displaces federal common law because it “speaks directly” to the carbon dioxide emissions from the defendants’ power plants. *Am. Elec. Power Co.*, slip. op. at 10. The Court went on to state that EPA — and not the federal judiciary — is “best suited to serve as primary regulator of greenhouse gas emissions” due to its scientific, economic, and technological resources. *Id.* at 14.

While the holding on displacement of federal common law was unanimous, the Court was split 4-4 on whether plaintiffs have standing to bring the suit. As a result, the Second Circuit’s holding that the plaintiffs have standing remains intact, leaving open the possibility of future lawsuits involving issues not displaced by the Act or the federal government’s efforts to regulate GHG emissions. In addition, the Court remanded the question of whether the plaintiffs could proceed under state nuisance law because the parties did not brief this issue.

II. EXPERTS

Sixth Circuit Excludes Expert Proof for Failing to Address Exposure Level

In a decision that underscores the importance of expert analysis of exposure levels in the context of toxic tort actions alleging personal injury from contamination, the Sixth Circuit affirmed a district court’s decision to exclude an expert’s specific causation testimony as unreliable and to grant summary judgment to defendant. See *Pluck v. BP Oil Pipeline Co.*, No. 09-4572 (6th Cir. May 12, 2011), available at <http://www.bdlaw.com/assets/attachments/Pluck.pdf>.

Plaintiffs asserted claims for strict liability, negligence, and loss of consortium in connection with benzene contamination in drinking water wells that allegedly caused illnesses, including non-Hodgkin’s lymphoma. *Id.* at 3–4. Plaintiffs’ expert on causation did not specify a diagnosis methodology in the initial report, and, after the court’s submission deadline, the expert filed a supplemental report specifying a “differential diagnosis” (i.e., the elimination of potential causes) methodology. *Id.* at 4. The defendant moved both to exclude this testimony as unreliable under the standard set forth in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and for summary judgment for lack of specific causation. *Id.* The district court granted both motions.

The Sixth Circuit affirmed both the exclusion of the expert’s testimony and the grant of summary judgment for defendant. *Id.* at 2. The Sixth Circuit rejected the expert’s testimony as inadequate because he formulated his opinion without data as to the plaintiffs’ exposure to benzene and instead relied on the theory that there is “no safe dose” when it comes to benzene exposure; a theory that has been rejected by other courts. *Id.* at 5. The Sixth Circuit also deemed the expert’s testimony to be conjecture that failed both to consider benzene as the cause of illness and to rule out alternative causes of illness. *Id.* at 10, 12. The Sixth Circuit further concluded that

the expert's supplemental report was unreliable because it attempted to introduce a new diagnosis methodology that contradicted the expert's prior causation opinion. *Id.* at 13.

Third Circuit Finds Expert Properly Excluded Under Federal Evidence Rules, Not State Substantive Law

In a decision that reaffirms the propriety of relying on federal evidentiary law to decide issues of expert admissibility, even when the effect may be tantamount to a ruling on an issue of substantive law, the U.S. Court of Appeals for the Third Circuit affirmed a Pennsylvania District Court's decision to exclude a plaintiff's expert's testimony that exposure to defendant's product caused plaintiff to develop cancer. See *Pritchard v. Dow Agro Sciences*, No. 10-2168 (3d Cir. June 2, 2011), available at <http://www.bdlaw.com/assets/attachments/Pritchard.pdf>.

Plaintiff alleged that defendant's insecticide product had caused him to develop non-Hodgkin's lymphoma. *Pritchard*, slip op. at 1–2. To support his complaint, plaintiff hired an expert witness who provided both a report and a declaration stating that the product was the cause of plaintiff's cancer. *Id.* at 2.

The district court found the expert's proposed testimony unreliable under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702 because the expert's conclusions were unsupported by the full spectrum of information pertaining to plaintiff's exposure. *Pritchard*, slip op. at 2, 5. On appeal, plaintiff argued that the district judge improperly applied the doctrine set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), by relying on substantive federal common law to rule on a cause of action that was filed in federal court based on the tenets of federal diversity jurisdiction. *Id.* at 2–3. Specifically, plaintiff alleged that the factors considered by the district judge were inconsistent with established Pennsylvania substantive law governing causation. *Id.* at 3.

The Third Circuit affirmed, finding that the district judge's decision was an “evidentiary ruling, separate and distinct from any substantive question regarding causation.” *Id.* at 4. Such a ruling, noted the court, is governed by federal law, and the district judge properly considered a host of factors to determine that the testimony failed to satisfy the admissibility standard under Rule 702. *Id.* at 3–4. According to the appeals panel, the district judge did not adopt any “bright-line” rule and thus properly applied the federal law governing admissibility of expert testimony. *Id.* at 3–4.

Federal Court Finds Historian Trumps Chemical Engineer in Contamination Case

In a decision that emphasizes the importance of credible expert testimony to disprove causation, the U.S. District Court for the District of South Carolina, following a bench trial, entered judgment in favor of the defendant by holding that defendant's expert historian had given more credible testimony than plaintiff's chemical engineering expert. See *AVX Corp. v. Horry Land Co.*, No: 4:07-CV-3299-TLW-TER (D.S.C. May 12, 2011), available at www.bdlaw.com/assets/attachments/AVX.pdf.

Plaintiff AVX Corporation sought recovery from the United States for up to fifty percent of AVX's potential costs associated with the investigation and cleanup of groundwater contaminated with trichloroethylene (“TCE”) and related hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). *AVX Corp.*, slip op. at 2–3.

Plaintiff (and its predecessor) leased property adjacent to the site at issue from 1949 to 1986 and used TCE as a degreaser in its operations, including storage in both aboveground and underground tanks. Despite conceding that TCE had migrated from its property to the property

at issue through groundwater, plaintiff alleged that the operation of a nearby U.S. military facility between the 1940s and the 1990s also contaminated both the site at issue and the plaintiff's property. *Id.* at 4, 12.

Plaintiff's expert witness, a chemical engineer, opined that TCE was used at the military facility for chemical warfare training, dry cleaning, and cleaning small arms. *Id.* at 32. The United States countered with a historian, who opined that TCE was neither available nor used at the military facility in the 1940s because the use of TCE was extremely limited at that time. *Id.* at 33. Plaintiff's expert engineer offered no opinion as to the historical availability of TCE at the military facility during the 1940s. *Id.*

The court afforded greater weight to the historian's testimony, emphasizing the importance of historical research at the U.S. National Archives and Records Administration as a contrast to the research of the chemical engineer, which was drawn from a local library and the internet. *Id.* Based on the consistency between the historian's opinion and the historical record, the court concluded that, despite the plaintiff satisfying its initial burden to show that TCE could have contaminated the groundwater, the defendant overcame its burden to disprove causation based on the unavailability or lack of use of TCE at the military facility in the 1940s. *Id.* at 34. Accordingly, the court held that the plaintiff was responsible for all past and future cleanup costs. *Id.* at 36, 59.

III. SUBSURFACE CONTAMINATION

Third Circuit Holds Ongoing Migration Not a Continuing Tort

In a case that underscores the importance of timing and causation in continuing tort claims, the Third Circuit affirmed a district court's decision granting summary judgment in favor of the defendant and held that the statute of limitations barred nuisance, negligence, and strict liability claims for property damage related to ongoing contaminant migration. See *Haddonbrook Assocs. v. Gen. Elec. Co.*, No. 10-1744 (3d Cir. May 4, 2011), available at <http://www.bdlaw.com/assets/attachments/Haddonbrook.pdf>.

Despite New Jersey's applicable six-year statute of limitations, the plaintiff alleged property damage caused by the defendant's disposal of hazardous waste in the early 1990s. *Haddonbrook Assocs.*, slip op. at 3–4. The plaintiff argued that ongoing contaminant migration from the defendant's property constituted continuing torts, and thus the plaintiff's claims for nuisance, negligence, and strict liability were not barred by the six-year statute of limitations under the continuing tort doctrine. *Id.* The plaintiff filed suit in 2007, the defendant's relevant disposal activities occurred in the 1970s, and plaintiff had knowledge of its potential claims related to the contamination at least by 1994. See generally *id.*

The Third Circuit held that the plaintiff did not establish continuing torts of nuisance, negligence, or strict liability. *Id.* at 7. The court dismissed the nuisance claim because the plaintiff failed to prove that the alleged injury of diminished property value occurred within the limitations period, regardless of ongoing contaminant migration. *Id.* at 5–6. In dismissing the negligence claim, the court found that the plaintiff did not prove the defendant breached any duty during the limitations period, apart from the alleged breach of duty in the nuisance claim. *Id.* For the strict liability claim, the court found that the plaintiff did not show that the defendant's actions met the requirements for strict liability (namely, that the defendant used or allowed others to use land for the conduct of abnormally dangerous activities) within the applicable statute of limitations, regardless of the ongoing nature of the contamination. *Id.* at 6–7.

IV. NATURAL RESOURCE DAMAGES

New Jersey Court Finds That Extended Statute of Limitations Applies to Common-Law Natural Resource Damage Claims

New Jersey's intermediate appellate court has held that the State's statute-of-limitation extension law, N.J.S.A. 58:10B-17.1, which extended the limitations period associated with claims brought by the State under the "State's environmental laws," applies to both statutory and common law causes of action, allowing the State to seek natural resource damages ("NRD") based upon both statutory and common law claims. *See New Jersey Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, No. A-0314-09T2 (N.J. Super. Ct. App. Div. May 31, 2011), available at <http://www.bdlaw.com/assets/attachments/NJ%20DEP.pdf>.

The State originally filed two complaints alleging statutory Spill Act claims and common law claims of nuisance and trespass for groundwater contamination. *New Jersey DEP*, slip op. at 3. The court dismissed both common law claims on defendant's motion for summary judgment, holding that those claims were time-barred by the applicable statute of limitations. *Id.* The State filed an amended complaint that included a claim for strict liability, seeking to obtain NRD related to two contaminated properties. *Id.* Defendants moved again for summary judgment, arguing that the State law extending the statute of limitations applies only to statutory causes of action, and therefore the State's common-law strict liability claim was time-barred. *Id.* The trial court granted defendant's motion, and the State appealed. *Id.* at 3-4.

The appellate court reversed, holding that common law is part of the State's "environmental laws." *Id.* at 2. Although the court did not find the statute as "unambiguous" as the State asserted, the court noted that the statute's legislative history evinced an intent to expand, not constrain, the ability of the State to initiate NRD litigation. *Id.* at 15-17. The court compared the statute's terms to the those of the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(g)(1), which has been interpreted to stay the tolling of the statute of limitations for NRD claims while remedial work is underway, and concluded that applying the New Jersey statute-of-limitations extension law to a common law claim for strict liability for NRD would be consistent with CERCLA. *Id.* at 22-24.

V. CLASS ACTIONS

Ninth Circuit Finds CAFA Removal Rights Limited to Original Defendants

In a case implicating Congress's intent in passing the Class Action Fairness Act of 2005 ("CAFA"), the U.S. Court of Appeals for the Ninth Circuit held that a counterclaim defendant or third-party defendant is not a "defendant" as that term is used in CAFA's provision allowing removal of claims to federal court. *See Westwood Apex v. Contreras*, No. 11-55362 (9th Cir. May 2, 2011), available at <http://www.bdlaw.com/assets/attachments/Westwood%20Apex.pdf>.

In the case at issue, the plaintiff filed a breach of contract action against defendant to recover \$20,000 on an unpaid student loan. *Westwood Apex*, slip op. at 5. The defendant answered and filed a class-action counterclaim, alleging violations of various California consumer protection laws, joined approximately 7,000 counter-plaintiffs, and increased the amount in controversy to a figure in the hundreds of millions of dollars. *Id.* at 6.

Under CAFA, federal jurisdiction is proper where a case is comprised of at least 100 members, the aggregate amount of all plaintiffs' alleged damages exceeds \$5 million, and at least one class member is a citizen of a state diverse from the defendant. 28 U.S.C. § 1332(d)(2). The plaintiff, who was also the counterclaim defendant, removed the case to federal court under Section 5 of CAFA, which allows a defendant to remove an action to federal court without the consent of all defendants. 28 U.S.C. § 1453(b).

The Ninth Circuit held that the CAFA removal provision should be interpreted to preclude removal by counterclaim defendants and third-party defendants to an action. *Westwood Apex*, slip op. at 18. According to the court, the term “defendant” has an established meaning under Chapter 89 of the Judicial Code, which governs removal, and must be interpreted in light of that established meaning. *Id.* at 11–12. The meaning of the term “defendant,” noted the court, was announced by the U.S. Supreme Court in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), and includes only *original* defendants to an action. *Westwood Apex*, slip. op at 11–12.

The court also relied heavily on the established purposes of the CAFA removal provision, noting that CAFA was designed to eliminate certain barriers to removal for qualifying class actions. *Id.* at 9. The court found the absence of any indication in the statute’s legislative history regarding Congress’s intent to depart from *Shamrock* or change the meaning of the term “defendant” to be evidence that that established meaning “survived the enactment” of CAFA. *Id.* at 14–16. The U.S. Court of Appeals for the Fourth Circuit came to the same conclusion in *Palisades Collections, LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008).

VI. MEDICAL MONITORING

Wisconsin Appellate Court Rejects Medical Monitoring Claims Absent Injury

Citing decisions from at least six other states and the U.S. Supreme Court, the Wisconsin Court of Appeals held that increased risk of future harm does not constitute an actual injury sufficient to state a tort claim, and therefore rejected claims seeking damages for future medical monitoring expenses. See *Alsteen v. Wauleco, Inc.*, No. 2010AP1643 (Wis. Ct. App. June 14, 2011), available at <http://www.bdlaw.com/assets/attachments/Alsteen.pdf>.

In the case at issue, the plaintiffs filed tort law causes of action against defendant, the operator of a window factory that plaintiffs alleged was responsible for dioxins, pentachlorophenol, and benzene in groundwater. *Alsteen*, slip op. at 3. Certain plaintiffs alleged that their mere exposure to any amount of these substances created an increased risk of future harm. *Id.* at 3–4. The defendant moved to dismiss the plaintiffs’ claims, arguing that plaintiffs failed to allege an actual, present injury, as required under Wisconsin law. *Id.* at 4.

The Wisconsin Court of Appeals, the state’s intermediate appellate court, affirmed the lower court’s dismissal of plaintiffs’ claim, concluding that Wisconsin law requires actual injury to maintain a tort action. *Id.* at 5. The court clarified that neither increased risk of cancer, mere exposure to dangerous substances, nor a purported need for medical monitoring constitute an actual injury sufficient to state a claim. *Id.* at 6–12. The court also relied on the U.S. Supreme Court’s decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), in which the Court surveyed state common law cases addressing medical monitoring as a basis for tort causes of action and declined to create a “new, full-blown, tort law cause of action” awarding such relief. *Alsteen*, slip op. at 14.

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